

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





77-1190

*Original*  
*with affidavit of service*

Docket #77-1190

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~

To be argued by  
Stephen Flamhaft

THE UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

-against- :

FELIX C. ACEVEDO and RALPH MARIANI, :

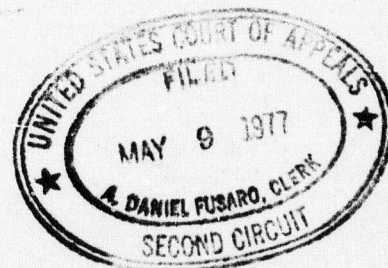
RALPH MARIANI-Defendant-Appellant :

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*B*  
*P/S*

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
Docket No. 77-1190

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UNITED STATES OF AMERICA

Plaintiff-Appellee

-against-

RALPH MARIANI

Defendant-Appellant

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PRELIMINARY STATEMENT

RALPH MARIANI now appeals from a judgment of the United States District Court for the Eastern District of New York, entered December 12, 1975, convicting him after a jury trial of aiding and abetting bank robbery by force, violence or intimidation (Count 1), and of aiding and abetting armed bank robbery (Count 2) in violation of 18 USC Sections 2113(a), 2113(d) and 2, and sentencing him to serve a term of imprisonment of 8 years (Platt, J.). Specifically, this appeal brings up for review a post-conviction finding, made by Hon. Thomas C. Platt, U.S.D.J., after an evidentiary hearing held at the direction of this Court, that the defendant had consented to



the search of his automobile by law enforcement agents.

### ISSUE PRESENTED

Did the defendant freely and voluntarily consent to the search of his automobile?\*

### INTRODUCTION

Once again, this Court is presented with a Government claim that a citizen in custody willingly consented to a police search he knew would result in the discovery of incriminating evidence which would lead inexorably to his criminal conviction.

In the case at bar, uncontradicted evidence showed that, prior to the alleged consent, the defendant had been taken into custody by no fewer than four officers who had rushed into his bathroom and arrested him in the shower. Indeed, the Government's own witness established that when

\*A second issue, regarding the propriety of the denial of the defendant's motion for a severance, is also before the court. That issue was raised by the defendant on his initial appeal from the judgment but was never reached by the Court. (See, Statement of the Case, infra) The defendant contends that even if the Court sustains Judge Platt's finding of consent, a new trial nevertheless must be ordered because defendant was improperly compelled to stand trial jointly with the co-defendant, Felix C. Acevedo (see Point II infra)

the purported consent was given, the defendant was in custody, possibly handcuffed in his own living room, and surrounded by five armed officers, one of whom was holding a shotgun.

Moreover, although the defendant testified that the coercive behavior of the police, including a threat to involve his wife, had occurred immediately following the arrest, the Government did not even attempt to refute his account with the testimony of any of the officers present at the time. Instead, sole reliance was placed on the testimony of an agent who had arrived later and who expressed the incredible view that the defendant, arrested and surrounded by police armed with handguns and a shotgun "seemed to be in control of the situation."

Under these circumstances, it is clear that, by any standard, the Government has failed to sustain its burden to prove that the defendant's consent was freely and voluntarily given. Judge Platt's finding to the contrary was plainly error.

#### STATEMENT OF THE CASE

Following a jury trial upon Indictment No. 75Cr676,



the defendant was convicted of aiding and abetting bank robbery by force, violence or intimidation, and of aiding and abetting armed bank robbery. He was sentenced to serve a term of imprisonment of eight years.

On appeal from the conviction, the defendant made four separate assertions of error. Two of his contentions, viz. that the trial evidence was insufficient to support the finding of guilt, and that the Government had been improperly permitted to impeach him with proof of his prior narcotics conviction, were rejected by this Court (see 539 F2d 917-921). A third contention, that the defendant had been improperly impeached by the use of evidence seized as a result of the search of his car, was sustained, and, consequently, the conviction was reversed and the case remanded for a new trial (see Id at 921-924 ). In view of the reversal, the Court did not reach, and therefore never passed upon, the defendant's fourth contention, that the trial court had abused its discretion in denying a severance.

Thereafter, by an order dated August 16, 1976, this

Court granted the Government's motion to amend the mandate "to provide for a hearing on the legality of the search of defendant's car instead of a new trial."



### THE HEARING

On October 21, 1976, a hearing was held in the United States District Court for the Eastern District of New York. Hon. Thomas C. Platt, U.S.D.J., presided. The Government called only one witness, Special Agent Henry Garcia of the Federal Bureau of Investigation. The defense offered the testimony of the defendant himself. The accounts these witnesses gave were substantially as follows.

#### A. Garcia

At approximately 11:30 P.M. on August 25, 1975, Agent Garcia sat waiting in the vicinity of Argyle Road in Brooklyn keeping watch on the defendant's car and intending to arrest him if he appeared.(3-4)\* Shortly before midnight, Special Agent Matthew J. Cronin radioed Garcia to advise him that the defendant had been arrested at his apartment and to ask his assistance in view of his fluency in Spanish.(4,18) Garcia immediately left his post and proceeded to the defendant's apartment on East 19th Street, arriving some five minutes after having received Cronin's message.(4,6,18)

\*Numbers in parentheses refer to the pages of the transcribed record of the hearing.

Upon entering the apartment, Garcia encountered Cronin and three officers of the New York City Police Department.\* The defendant, who Garcia was later told had been arrested in the shower, was also present and might have been handcuffed.(6,20)\*\*

Garcia asked Cronin if he had advised the defendant of his rights, and although Cronin replied that he had, Garcia decided to readvise the defendant of his constitutional (Miranda) rights orally and in Spanish (6-7,18-19). Then, flanked by one of the City detectives, Garcia told the defendant that he had been arrested "in connection with the bank robbery that had occurred on that day at the ... Chemical Bank" on Cortelyou Road in Brooklyn (7,11-12). Having been advised by Cronin that "we would want to secure ... Mariani's permission to search his car," Garcia "indicated to [the defendant] that we wanted to search his car. He stated that he would grant us his permission. I indicated that I would have to obtain a written permission from him, and he indicated that we would

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\*On direct examination Garcia mentioned only two detectives as having been with Cronin in the apartment.(6) On cross-examination,however, he named a Sergeant Gilmartin as also having been present. (20-21)

\*\*Garcia testified that he was not "100% sure" of whether or not the defendant had been wearing handcuffs in the apartment. (20)



find a gun and some ammunition in the car ... I advised him that he had the right to refuse permission for the search of his car .... He indicated that he would be willing to furnish us with permission for the consent to search his car."(8)

Although the F.B.I. has special forms, always available in its New York office, for use in securing permission to search a car, Garcia, who did not have the form with him, chose, in the interest of expediting matters, not to get one.(23-25) Instead, after having determined that the defendant could read and write English, Garcia wrote out a grant of permission on a piece of paper he took from Cronin. He then read it aloud and showed it to the defendant, and asked him to sign it. The defendant did so.(9,25) The note read,

"I Ralph Mariani have been advised of my rights and I understand my rights. I voluntarily permit the F.B.I. to search my automobile. No threats or promises have been made to me to grant this permission."  
(11)

After he signed the slip, the defendant delivered the keys to the automobile to Garcia who in turn passed them to another officer to search the car. (14)

Throughout the course of the interrogation, and

while the permission slip was being drawn, read and signed, one of the City detectives stood nearby holding an exposed shotgun, although "not in the immediate area of the defendant." The other officers had their sidearms holstered. (20)

Garcia testified that, through subsequent interviews, he had learned that the defendant was 29 years old, had had 11 years of education, and had been arrested some 11 times in the past. (15-17) On cross-examination, Garcia estimated that he had gotten the defendant's signature on the permission slip in no more than five minutes. (11,25-26) He could not say whether Cronin had tried to get the car keys before he arrived. (19)

Finally, Garcia told the court of his impression that the defendant had not suffered anxiety or been overwrought over the presence of police officers in his home. The witness observed, "He did not appear nervous, and he seemed to be in control of the situation, that is, he seemed to have a lot of confidence in himself." (23)

B. Mariani

On the evening in question, "I [the defendant]



called my wife, she said that there was agents in my house they were looking for me; so she said they left. When I went over here to my house, I called Mr. Cronin, I told him I was going to turn myself in. So after I did that, I was a little dirty, I figured I would take a shower, I jumped in the shower. I was there maybe, not even a minute, put the soap on, all of a sudden the door bust open, two agents came out with guns. They went in the bathroom, they told me to get out. I said, 'Please let me get the soap off me, please' they said, 'Get out of there.' They pulled me out nude and they took me to the living room. I had all the soap, water dripping. I said 'Let me get my clothes' they said, 'You stay where you are.' Then they started walking all over the house, then three more came in, then I sat down. They sat me down, then they decided to take the handcuffs off. One of them said 'Is this what you were wearing?' I said, 'yes.' So he gave me the clothes, so I got dressed, just my pants..."

(27-28)

Thereafter, one of the officers sat down with the defendant, advised him of his rights and gave him a piece of paper to sign. The paper was explained as simply an acknowledgment that the rights had been given, and the defendant

signed it without reading it (28) "I was scared. All I was looking at was this officer with a gun in his hand." In fact, all four officers present "had guns pointed down, I was shook up, scared." (29-30)

As two of the officers were looking through his drawers and closets, another began asking the defendant about his car. Finally, after hearing one of the agents threaten to involve the defendant's wife if he refused to cooperate, and still in fear of "the guy with the gun," the defendant "got scared and gave him the keys." (30-31) No agent ever told him he had the right to refuse permission for the search. (32)

It was only later that Agent Garcia arrived at the apartment. He gave the defendant a second piece of paper to sign, telling him that it was simply another acknowledgment that he had been advised of his rights. The defendant signed it without having read it. (29-30,33)

On the witness stand, Mariani acknowledged that he had had eleven years of schooling in New York. He also conceded that he had been arrested on eleven previous occasions. (34-35) However, he insisted that those experiences



were nothing like this one, and did not serve to prepare him for the tension-filled confrontation. They were "[n]ot like this, not with guns; walking down the avenue, they bust me, my friend had a needle, so they take us in; that's what I get arrested for....The door didn't open the way it opened up was like a bomb, and two guys with a gun, I figured I was going to get killed." (29-30)

As for the consent form itself, the defendant told the court that "I remember signing it. All I had in my mind was the guy with the gun, my wife, what a mess I got into." (32-34, 37, 39)

At the close of testimony, the court found that the defendant had voluntarily consented to the search of his car. It is from this finding that the defendant appeals.

## ARGUMENT

POINT 1: THE GOVERNMENT HAS PLAINLY  
FAILED TO MEET ITS BURDEN  
OF SHOWING THAT THE DEFEN-  
DANT VOLUNTARILY CONSENTED  
TO THE SEARCH OF HIS CAR

It was once observed that "no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered." Higgins v. United States, 209 F2d 819,820 (D.C.Cir. 1954). Compelling as this comment may seem, it does not express the presently prevailing policy view of the law of search and seizure.

Rather, it is now firmly established and frequently held that a warrantless search conducted pursuant to the consent of the accused is not proscribed by the Fourth Amendment. Katz v. United States, 389 US 347 (1967). However, whenever the Government seeks to circumvent the warrant requirement of the Constitution by attempting to justify a search on the basis of consent, it must assume the burden of establishing, from the totality of the circumstances, that the consent was voluntarily given. Schneckloth v. Bustamonte, 412 US 218 (1973); Bumper v. North Carolina, 391 US 543 (1968). "Consent to search is voluntary when it is a true act of will,



an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle." People v. Gonzalez, 39 NY2d 122, 128 (1976)(per Breitel, Ch.J.). See, also, United States v. Albarado, 495 F2d 799,806 (2nd Cir. 1974).

In United States v. Griffin, 530 F2d 739 (7th Cir. 1976), the court concisely outlined those factors deemed relevant to the question of consent, and spoke of the process by which a trial judge's findings on the issue are reviewed. The court wrote.

It is well settled that a person may waive his or her fourth amendment rights by consenting to a search....The consent may be in the form of words, gesture, or conduct....The consent, however, must be voluntary, i.e. freely and intelligently given....

The existence and voluntariness of a consent is a question of fact....Therefore, only where the district court's findings of voluntary consent is clearly erroneous may a reviewing court set it aside....A consent obtained through the use of coercion, whether actual or implicit, is inherently involuntary. The form of coercion, whether it be physical or psychological, is of no consequence. Subtle coercion, in the form of an assertion of authority or color of office by the law enforcement officers may make what appears to be a voluntary act an involuntary one....Likewise the obtaining of consent from a person in custody is inherently suspect....However, neither the mere fact of arrest nor the person's knowledge that a search "will

almost certainly demonstrate his guilt " preclude the finding of a voluntary consent....All of these considerations emphasize the fact that in determining the voluntariness of a consent, the "psychological atmosphere" in which it is obtained is of critical importance. 530 F2d at 742-743 (Emphasis supplied)(citations omitted)

In the case at bar, the Government relied entirely on a note, handwritten by an F.B.I. agent and signed by the defendant, granting permission to search the car and disclaiming that the consent had been induced by threat or promise. But the agent who had taken the consent and who was the Government's only witness at the hearing had not been present at the arrest or at its immediate aftermath. He therefore could not dispute either the defendant's sworn account of the circumstances surrounding and following his arrest or his recitation of the pressures, fears and threats to which he had then been subjected.

The defendant testified without contradiction that several officers invaded his home and took him from the shower without even affording him an opportunity to rinse the soap from his body. He was immediately handcuffed, and initially even denied permission to dress. His captors had guns drawn, and one officer, of whom he was particularly frightened, stood nearby displaying a shotgun.\* As two of the officers began to rummage through the

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\*The presence of this officer was confirmed by the Government's own witness.



defendant's closets and drawers, a third turned to the subject of his car.

As this Court properly noted on the initial appeal herein, the fact that the consent was given while the defendant was in custody does not preclude a finding of voluntariness. 539 F2d at 522. However, the Court has also held that, because of "the close relationship between custody and coercion," a determination of the voluntariness of consent given in custody requires even more careful judicial scrutiny. United States v. De Marco, 488 F2d 828, 831 n.7 (2nd Cir. 1976). See, also, United States v. Weiner, 534 F2d 15, 17 (2nd Cir. 1976). Accord, Villano v. United States, 310 F2d 680 (10th Cir. 1962); United States v. Page, 302 F2d 81 (9th Cir. 1962).

In the case at bar, the defendant portrayed a custodial scene rife with coercion. It is respectfully submitted that his precipitous and abusive arrest, the number of armed officers surrounding him, and the lingering presence of the agent holding the shotgun are simply inconsistent, and indeed irreconcilable, with a freely given and voluntary consent. United States v. Edmond, 413 F. Supp. 1388 (E.D.Mich. 1976). See, also, Kirvelitis v. Gray, 513 F2d 213 (6th Cir. 1975); United States v. Hearn,

496 F2d 236 (6th Cir. 1974); People v. Gonzalez, supra.

Moreover, although the coercive atmosphere under which it was made would alone require a finding that the consent was invalid, in the case at bar, an additional and highly significant factor makes that result inescapable. The defendant testified, without contradiction, that he had given permission to search only after a direct threat had been made to involve his wife if he refused to cooperate. Indeed, he swore that his cooperation had been the direct result of his fear of the armed officer and his concern for the welfare of his wife.

In United States v. Bolin, 514 F2d 554 (7th Cir. 1975), the defendant, while in custody, signed a "Permission to Search" form consenting to the search of his home. The evidence revealed that he had signed the form only after agents had told him "that if he signed the search waiver that [they] would not arrest his girl friend." Id at 556. The court held the search invalid, observing "[w]here consent is given in response to... an implied threat, the consent cannot be considered voluntary." (Id at 560). It is the defendant's submission that precisely the same result is required here.



In the defendant's view, the district court went astray by focusing strictly on the slip of paper he had signed - this despite this Court's warning on the initial appeal that the defendant's execution of a written consent "would not be conclusive with respect to its voluntariness." 539 F2d at 922. Judge Platt's decision seemed to be based upon his expressed skepticism regarding the truth of the defendant's assertion that he had believed the consent form to be merely an acknowledgment that he had received his Miranda rights. The Judge's view, with all respect, is unpersuasive since the handwritten note, handed to the already exercised defendant, began, "I Ralph Mariani have been advised of my rights and I understand my rights..." Moreover a claimed misunderstanding of even a printed form hardly constitutes novel grounds for invalidating a consent. See, e.g., United States v. Pugh, 417 F. Supp 1019, 1022 (W.D.Mich 1976).

In any event, it was not so much the defendant's comprehension of the contents of the form as the coercion that induced him to sign it that formed the crucial issue below. Yet the district court failed to address it. Its ruling simply disregarded or overlooked the defendant's testimony,

and in effect held that the Government had met its burden of proof on an issue upon which it had presented no evidence - i.e., whether the defendant had been subjected to coercion before Agent Garcia arrived. This was plain error. Cf. People v. Gorsl re, 47 AppDiv2d 273 (3rd Dept. 1975). Compare United States v. Tortorello, 533 F2d 809 (2nd Cir. 1976).

In sum, the defendant submits that in view of the needlessly abusive arrest, the number of armed officers in his home, the obvious presence of an agent holding a shotgun, the warrantless search of his closets and drawers, and the direct threat made against his wife, "the defendant's resulting 'consent' was no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." Schneckloth v. Bustamonte, supra, at 228. The findings and judgment of the district court should be reversed and the case remanded for a new trial.



POINT II: IN THE ALTERNATIVE, A NEW TRIAL  
SHOULD BE ORDERED ON THE GROUNDS  
THAT THE DISTRICT COURT ABUSED  
ITS DISCRETION IN DENYING THE  
DEFENDANT'S MOTION FOR A SEVER-  
ANCE

On his initial appeal, the defendant sought reversal on the ground that the district court had abused its discretion in denying his motion for a severance. This Court, which reversed on other grounds, never reached that question. 539 F2d at 924

The defendant submits that, should this Court affirm the findings below and determine that the defect originally thought to require reversal has been cured, it must still decide the question of whether a severance should have been granted. For the reasons set forth in his initial brief on appeal, the defendant urges the court to reverse and remand the case for a new trial on the ground that his motion for a severance was improperly denied.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, THE  
JUDGMENT FROM WHICH THIS APPEAL IS  
TAKEN SHOULD BE REVERSED AND A NEW  
TRIAL ORDERED.

Dated: Brooklyn, New York  
May 1977

Respectfully submitted,  
STEPHEN FLAMHAFT  
Attorney for the Defendant  
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Brooklyn, New York 11201





STATE OF NEW YORK, COUNTY OF KINGS

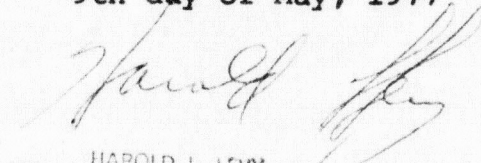
KRIS WOLBRUM, BEING DULY SWORN, DEPOSES AND SAYS THAT DEPONENT IS NOT A PARTY TO THIS ACTION, IS OVER 18 YEARS OF AGE, RESIDES AT 824 E. 9th STREET, BROOKLYN, NEW YORK 11230.

On May 9, 1977, deponent served the within BRIEF FOR APPELLANT upon Assistant U.S. Attorney Cheryl Schwartz, at 225 Cadman Plaza East, Brooklyn, New York 11201, the attorney for the Plaintiff-Appellee, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service within the State of New York



KRIS WOLBRUM

SWORN TO BEFORE ME THIS  
9th day of May, 1977



HAROLD L. LEVY  
Notary Public, State of New York  
No. 52-2338525  
Qualified in Suffolk County  
Commission Expires March 30, 1978



